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FOREWORD

THE CHALLENGES: PAST IS PROLOGUE

The Honorable Elizabeth B. Lacy *

It is a particular honor and privilege to contribute this foreword to the *University of Richmond Law Review's Annual Survey of Virginia Law*. The *Annual Survey* editions provide the practicing lawyer and judge with a comprehensive overview of the previous year's statutory and common law developments in the Commonwealth. For those who seek to discern trends in the law or identify highlights of new developments that will affect individual, commercial, and governmental actions as well as the actual practice of law, the *Annual Survey* is a useful tool in the arsenal of material available. This year's *Annual Survey* continues that tradition; however, recent changes in the Commonwealth's legal landscape cannot be reflected in a survey of the law.

The University of Richmond School of Law welcomed Rodney Alan Smolla as its new dean, only the eighth dean in the School of Law's 131-year history. Another extraordinary transition occurred when former Chief Justice Harry L. Carrico retired from the Supreme Court of Virginia, and Leroy R. Hassell, Sr. was installed as Chief Justice. Justice Carrico served on the court for forty-two years—twenty-two of those years as Chief Justice—a truly remarkable and unparalleled achievement. Chief Justice Hassell is the first African American to serve as Chief Justice of the Supreme Court of Virginia, an equally notable achievement.

* Justice, Supreme Court of Virginia. B.A., 1966, St. Mary's College; J.D., 1969, University of Texas; LL.M., 1994, University of Virginia.

Changes of such magnitude prompt reflection on the judicial branch's many challenges, both those faced and addressed in the past and those yet to be recognized. Such challenges include changes in both the quantity and types of services rendered.

The increased number of cases over the past fifteen years defines much of the pressure on judicial branch operation. In 1989, the year Chief Justice Hassell joined the Supreme Court, approximately 1,500 petitions were filed in the Supreme Court of Virginia¹—by 2000, that number had doubled.² This magnitude of workload increase has been reflected throughout the court system. The 2,010 petitions filed in the Court of Appeals of Virginia in 1989³ grew to over 3,400 in 2002.⁴ In that same period, the number of circuit court filings grew from 205,000⁵ to 275,000 cases;⁶ the number of cases filed in general district courts rose from 2.8 million⁷ to 3.1 million;⁸ and the juvenile and domestic relations district courts docket increased from 296,000 cases⁹ to over 540,000.¹⁰ To handle the caseload, by 2002 the General Assembly of Virginia added sixty-one judicial positions to the existing 341—one in the Court of Appeals, nineteen in the circuit courts, eleven in the general district courts, and thirty-three in the juvenile and domestic relations district courts.¹¹ Thus, in 2002, approximately four million new cases were presented to 402 judges and justices for resolution.

The judicial branch instituted a number of mechanisms during this fifteen-year landscape to handle the burgeoning caseload. Guidelines for sentencing and more efficient calendar management have been implemented in the trial courts to ensure consistent and efficient administration of justice. The technology explo-

1. See Supreme Court of Virginia, *Judiciary's Year in Review*, in 1989 VIRGINIA STATE OF THE JUDICIARY REPORT A-22 (1990).

2. See Supreme Court of Virginia, *Judiciary's Year in Review 2002*, in 2002 VIRGINIA STATE OF THE JUDICIARY REPORT A-49 (2003).

3. See Supreme Court of Virginia, *supra* note 1, at A-24.

4. See Supreme Court of Virginia, *supra* note 2, at A-55.

5. See Supreme Court of Virginia, *supra* note 1, at A-29.

6. See Supreme Court of Virginia, *supra* note 2, at A-72.

7. See Supreme Court of Virginia, *supra* note 1, at A-35.

8. See Supreme Court of Virginia, *supra* note 2, at A-114.

9. See Supreme Court of Virginia, *supra* note 1, at A-39.

10. See Supreme Court of Virginia, *supra* note 2, at A-127.

11. See generally VA. CODE ANN. § 16.1-69.6:1 (Repl. Vol. 2003); *id.* §§ 17.1-400, -507(A) (Repl. Vol. 2003).

sion, however, has been the single most important tool for processing the increased volume in caseload. Just as facsimile machines, computers, and cellular phones have altered the way attorneys practice law, such technology has changed the way business is done in the judicial branch. Computer programs standardizing case management, fiscal, and other record-keeping systems allow case tracking and information transfer at a rate and accuracy level previously unknown. The court system's computers also interface with a number of other state agencies including the State Police, Department of Taxation, Department of Social Services, Department of Juvenile Justice, Department of Accounts, and Department of Motor Vehicles—allowing exchange of judicial information pertinent to those entities. E-mail, teleconferencing, and video conferencing have dramatically changed communication regarding substantive and administrative matters and will continue to change the way business is conducted with and within the court system. Conducting legal research electronically and accessing dockets, opinions, rules, and other legal material through the Internet is rapidly becoming the norm. Proposals for “e-filing” cases are currently under consideration, and at some point in time, will no doubt become the procedure of choice for many attorneys practicing in the Commonwealth. Development and exploration of new technology-based systems will continue to be an integral part of the judicial branch's ability to meet future growth.

The challenge presented by the increase in caseload is more than just a matter of managing numbers. The types and complexity of cases and the means of resolving those disputes have also changed. Alternate dispute resolution, a major component in the practice of law today, was not much more than a subject for discussion in 1989. Recognizing the potential for a more satisfying, positive, and efficient resolution of cases, the Supreme Court of Virginia created the Office of Dispute Resolution in 1990 to promote alternative dispute resolution mechanisms and to provide a mediation certification program.¹² Since that time, mediation has become standard in domestic relations as well as in commercial litigation. In matters of custody and support, 7,183 mediations

12. See Supreme Court of Virginia, *The Judiciary Year in Review*, in 1991 VIRGINIA STATE OF THE JUDICIARY REPORT A-2 (1992).

took place in fiscal year 2003,¹³ up from 6,665 the previous fiscal year.¹⁴ More than 1,000 persons currently are certified as mediators.¹⁵ In addition to privately funded mediation, the judiciary's 2002–03 budget included \$500,000 for mediation services for those persons involved in domestic disputes.¹⁶

The creation and expansion of drug courts and other “problem-solving” courts reflects society’s growing expectation that the courts will address the underlying roots of the complex problems presented by the people who come into the court system. Since 1985, eighteen drug courts have been established and sixteen more are on the drawing boards, assuming adequate financing.¹⁷ The value of such courts can be measured in human and economic capital. National evaluations of recidivism report that rates of drug court graduates are less than half the recidivism rates of those not graduating from a drug court program.¹⁸ Comparisons between the cost of maintaining an inmate at a correctional institution with the cost of participating in a drug court program reflect significant economic savings.

These developments in and by the judicial branch can only occur if funded by the General Assembly. Funding for the judicial branch has remained constant over this period at one percent of the state’s budget.¹⁹ In the fiscal year ending July 31, 2003, the court system had operational expenditures of \$176,974,727.²⁰ Additional amounts for payment of defense for indigent criminals and for persons involuntarily committed to mental institutions

13. OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA, CRIMINAL FUND EXPENDITURE REPORT FOR FY 2003 AND FY 2002, at 1 (2003).

14. *Id.*

15. See OFFICE OF DISPUTE RESOLUTION, MASTER LIST OF COURT CERTIFIED MEDIATORS BY COURT CIRCUIT (June 27, 2003) at <http://www.courts.state.va.us/text/drs/mediators.htm> (last visited Sept. 22, 2003).

16. Act of May 17, 2002, ch. 899, 2002 Va. Acts 2222 (commonly referred to as the 2002 Appropriation Act).

17. OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA & VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES, SUMMARY REPORT ON VIRGINIA’S DRUG COURT PROGRAMS 4 (March 2003).

18. *Id.* at 5.

19. See, e.g., Act of May 1, 2003, ch. 1042, 2003 Va. Acts ____ (commonly referred to as the 2003 Appropriation Act) (illustrating that the state judiciary only receives roughly one percent of the entire state budget).

20. OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA, COMMONWEALTH ACCOUNTING AND REPORTING SYSTEM REPORTS (2003).

amounted to over \$78 million for a total expenditure of \$255 million.²¹

While the funding levels have allowed the judicial branch to accomplish much and provide quality service in a timely fashion, the funding level has not met all needs. Further, the failure to adequately fund the needs of the judicial branch does more than simply slow down the dispute resolution process. Lack of competitive compensation deters the best and the brightest in the legal field from seeking judicial positions. Records indicate that urban circuit court judges came into the newly reorganized judicial system in 1973 at an annual salary of \$40,200.²² In terms of real dollars, those salaries in 2003 should have increased to \$162,810 to have simply maintained the 1973 level of spending power as computed by the Consumer Price Index for inflationary factors.²³ As of November 25, 2003, these judges will actually earn \$125,795.²⁴

Failure to fund the creation of a family court has perpetuated a system that requires duplicative and disjointed consideration of domestic relations matters. In 1992, a two-year pilot program establishing eleven family courts was concluded.²⁵ By all accounts that program was successful in consolidating all matters relating to domestic relations issues into one venue, rather than dividing such issues among the general district, juvenile and domestic relations district, and circuit courts.²⁶ The concept of the family court failed, however, not due to defects in the concept, but for a lack of funding.²⁷ The inability to efficiently and most effectively address issues arising in the context of domestic relations continues and increases in size and complexity. It constitutes one of the most important challenges currently facing the judicial branch.

The judiciary in the twenty-first century has also experienced an enhanced need to provide appropriate methods for account-

21. *Id.*

22. OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA, JUDICIAL SALARIES ISSUE PAPER 2002, BIENNIAL GBUDGET SUBMISSION 6 (2002).

23. *Id.*

24. See Act of May 1, 2003, ch. 1042, 2003 Va. Acts ____ (commonly referred to as the 2003 Appropriation Act).

25. See Hon. Harry L. Carrico, *State of the Judiciary Message*, in 1992 VIRGINIA STATE OF THE JUDICIARY REPORT, at xi (1993).

26. See *id.*

27. See Hon. Harry L. Carrico, *State of the Judiciary Message*, in 2001 VIRGINIA STATE OF THE JUDICIARY REPORT, at xii (2002).

ability while maintaining its status as an independent branch of government. Judicial independence does not mean that judges can or should resolve disputes without regard for statutory law, common law, or principles of *stare decisis* and precedent.²⁸ Rather, it means that judges may make decisions in cases before them independent of external influences, such as a need to satisfy a particular constituency or to reflect a particular ideology. Judicial independence was seen by the founding fathers as a cornerstone for the success of the new republic. As Thomas Jefferson said "[t]he judges, therefore, should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be . . . *dependent upon any man or body of men.*"²⁹

But independence cannot mean the absence of accountability. In the last fifteen years, the public demand for government accountability has expanded to include the judiciary. Accountability serves the goals of improving performance in the court system and providing information to those responsible for the selection and retention of judges. The unique Virginia method of judicial selection and retention by the General Assembly for a term of years, eliminates the offensive and distracting practices of campaigning and fundraising accompanying the popular election of judges in other jurisdictions. It also eliminates the pressure on a judicial candidate or sitting judge to tailor his or her behavior in a manner that will secure election or re-election by the voting public. But it does not eliminate entirely the tension between judicial independence and judicial accountability.

Judges, like officers of the other branches of government, cannot act without regard to certain accepted norms. The Canons of Judicial Ethics succinctly set forth those judicial norms. They require judges to conduct themselves and their business competently, diligently, free from bias, and without the appearance of impropriety. At the request of the General Assembly, the judicial branch has crafted a pilot program for judicial performance evaluation based on these Canons that will begin this year.³⁰ If

28. Judicial independence at the federal and state level will be the topic of discussion in the March 2004 issue of the *University of Richmond Law Review*.

29. Letter from Thomas Jefferson to George Wythe (June 1776), in 1 *THE PAPERS OF THOMAS JEFFERSON* 410 (Julian P. Boyd ed., 1950).

30. See Act of May 1, 2003, ch. 1042, 2003 Va. Acts ____ (commonly referred to as the 2003 Appropriation Act) (discussing the program within Item No. 25).

this pilot program is successful, the information produced, if used properly by the General Assembly in considering candidates for judicial appointment or reappointment, is the type of information that is relevant and appropriate when making decisions on judicial candidates.

By providing this type of judicial performance information, the judiciary is taking a major step in shielding judges from the pressure of improper influences in their decision making process while meeting the needs of the General Assembly and public for judicial accountability. Currently, the qualifications of judicial candidates are often determined by evaluating a decision taken by the candidate in a specific case. Regardless of the legal merit of the candidate's position, it will inevitably conflict with the point of view of the losing litigant and his or her supporters. Using information acquired through the judicial performance evaluation in the selection and retention process can have a significant, positive impact on the challenge of maintaining an independent judiciary in the twenty-first century.

As former Chief Justice Carrico noted in his final state of the judiciary message, none of the policies or programs adopted to meet the challenges to the court system during his tenure were the work of a single individual.³¹ Addressing the ongoing challenges will take the continued combined effort of judges, administrators, lawyers, legislators, and members of the public. But, if past is prologue, those and other future challenges will be successfully addressed.

31. Hon. Harry L. Carrico, *supra* note 27, at xi.
